

Summaries of Nebraska Supreme Court and Court of Appeals Decisions on Workers' Compensation Cases

Fiscal Year 2005: July 1, 2004 to June 30, 2005

Supreme Court Cases:

1. Davis v. Goodyear Tire & Rubber, 269 Neb. 683, 696 N.W.2d 142 (2005)

LOSS OF EARNING POWER

The Supreme Court affirmed the trial court's finding regarding the extent of plaintiff's loss of earning power.

The parties stipulated that plaintiff's back injury was compensable. With restrictions, the plaintiff returned to work for defendant after the injury. The court-appointed vocational rehabilitation counselor provided loss of earning power evaluations for three scenarios: 1) 25-30 percent if the plaintiff was able to maintain his employment with defendant, 2) 60-70 percent if he was unable to maintain his employment with defendant, and 3) 40-50 percent if plaintiff were able to increase his skills through vocational rehabilitation services. The trial court found that the plaintiff suffered a 27.5 percent loss of earning power, which was affirmed by the review panel. Plaintiff appealed, claiming the counselor and trial court overemphasized his continued employment with defendant after the injury when determining loss of earning power.

The Supreme Court found that the trial court applied the correct legal standard in determining the loss of earning power. The trial court explained that while plaintiff's loss of earning power should be determined by reference to the general labor market, it should also include the actual job taken and considered as a part of the job mix available in the relevant labor market, ie., the job market in which the employee lives and works. In this case, the job to which plaintiff returned was found by the trial court to be "real, long-term, bona fide employment," which constitutes part of the entire market place of jobs which plaintiff could perform given his particular physical restrictions, skill, and training. With respect to whether a particular job should be excluded from the relevant job market, the trial court stated that the question is whether the particular job which plaintiff has is of the type which constitutes "make work," "artificial," or and "odd-lot" type of employment. If so, the job should be excluded. In this case, the trial court found that plaintiff's job was none of those; therefore it should be included in the analysis.

The inquiry as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W. 2d 166 (2004). Section 48-185 precludes an appellate court's substitution of its view of the facts for that of the trial court if the record contains sufficient evidence to substantiate the factual conclusions reached. *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W. 2d 813 (1999). The Supreme Court found that the trial court's findings were supported by the evidence and were not clearly wrong.

2. Dietz v. Yellow Freight Systems, 269 Neb. 990, 697 N.W.2d 693 (2005)

APPEAL AND ERROR

ATTORNEY FEES

The Supreme Court affirmed the order of the review panel regarding attorney fees.

The trial court awarded permanent total disability benefits for the claimant's back injury, permanent partial disability benefits for the right arm injury, payment of medical bills, attorney fees, and a 50 percent waiting-time penalty plus interest on any unpaid compensation for the right arm injury. Defendant appealed the award, and plaintiff cross-appealed, arguing that he was entitled to additional attorney fees for the late payment of benefits for the member impairment.

The review panel found that the trial court erred in failing to state whether any portion of the attorney fees was related to the late payment of benefits for the member injury. The review panel also found that the imposition of \$10,833.00 in attorney fees for the late payment of \$568.00 in medical bills was unreasonable. It directed the trial court to determine attorney fees pursuant to §48-125 for the late payment of benefits for the member injury and the late payment of medical expenses. On remand, the trial court awarded attorney fees of \$2,500.00, but did not specify how much of the total was allocated to the medical expense claim versus the member claim. Plaintiff cross-appealed, asserting for the first time that the trial court should have awarded interest for the entire award. The review panel affirmed the award of \$2,500.00 in attorney fees and imposed additional attorney fees of \$1,500.00 for the appeal. The review panel clarified that the plaintiff was entitled to interest for the late payment of benefits for the member injury. Plaintiff appealed, claiming he was entitled to interest on both the late payment of benefits for the member impairment and the difference between the permanent partial benefits paid prior to the entry of the original award and the permanent total benefits ultimately granted.

The Supreme Court stated that the rule has been that an appellate court will consider only those errors specifically assigned in the lower court and again assigned as error on appeal. *State v. Erlewine*, 234 Neb. 855, 452 N.W. 2d 764 (1990). In addition, Workers' Compensation Court Rule of Procedure 12 states that the party(s) appealing to the review panel are bound by the allegations of error contained in the application for review and will be deemed to have waived all others. When the review panel remanded the case to the trial court, it did so only for the determination of attorney fees. Therefore, that was the only issue that could be considered by the Supreme Court on appeal. In his appeal from the original award, plaintiff could have argued that the award of attorney fees for late payment of medical expenses entitled him to interest on the entire amount of the final award obtained. But since plaintiff did not argue that he was entitled to interest on the entire award in his original cross-appeal, he failed to preserve the issue for appellate review. The review panel order awarding interest only on the unpaid compensation for the member impairment was therefore affirmed.

3. Estate of Coe v. Willmes Trucking, 268 Neb. 880, 690 N.W.2d 610 (2005)

EMPLOYER DEFENSES

WILLFUL NEGLIGENCE

The trial court and review panel ruled that because the decedent was willfully negligent, his estate and two dependents could not recover benefits. The Supreme Court affirmed.

While driving for defendant, the decedent fell asleep and the truck left the road, resulting in his death. The evidence showed that defendant did not carry workers' compensation insurance as required by §48-145. The record also indicated that the decedent, in violation of federal regulations, had driven for about 17 hours at the time of the accident. Federal regulations require truck drivers to rest 8 hours after driving for 10 hours. See 49 C.F.R. 398.6 (2000). Defendant argued that plaintiffs could not recover because the driver was willfully negligent. Plaintiffs argued that defendant's failure to carry workers' compensation insurance precluded it from raising willful negligence as a defense.

The Supreme Court stated that plaintiffs' argument depended on the interaction between §§ 48-102 and 48-103. Section 48-103 provides that when an employer fails to carry workers' compensation insurance, he or she loses the right to raise the three defenses in §48-102. The common-law defenses of contributory negligence, assumption of the risk, and the fellow-servant rule are eliminated by §48-102, leaving only the employee's willful negligence and intoxication as defenses which the employer may raise. Plaintiffs argued that in addition to not being able to raise the three common-law defenses, the employer also loses the right to raise the two defenses preserved in §48-102, i.e., willful negligence and intoxication.

The Supreme Court identified two flaws in plaintiffs' argument. First, §48-103 states that the employer loses the right to raise "the three defenses mentioned in section 48-102." Noting that it is required to give statutory language its plain and ordinary meaning, see *Rodriguez v. Monfort, Inc.* 262 Neb. 800, 635 N.W.2d 439 (2001), the Court concluded that construing "three defenses" to mean two would be antithesis to that rule. Second, §§ 48-101, 48-109, and 48-127 all make willful negligence a defense. The Supreme Court opined that if the Legislature had intended §48-103 to limit §§ 48-101, 48-109, and 48-127, it would have drafted §48-103 so that it referred to these three sections in addition to §48-102. Therefore, employers can raise the defenses of intoxication or willful negligence, even if the employer is in violation of §48-103.

The Supreme Court next addressed whether the trial court erred in finding that the driver committed willful negligence. Willful negligence is defined, in part, as "such conduct as evidences reckless indifference to safety." Neb. Rev. Stat. §48-151(7). Reckless indifference to safety means more than lack of ordinary care. An employee's conduct must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). In this case, there was testimony that the decedent knew of the federal regulation restricting drive time. And exceeding the federal regulation by 7 hours showed that he deliberately violated the regulation. In addition, the evidence showed that the decedent had a previous accident because he fell asleep at the wheel, and his mother testified that he had an unusual tendency for falling asleep quickly. An appellate court gives considerable deference to a trial court's determination of whether conduct amounted to willful negligence and is precluded from substituting its own view of the facts. *Guico, supra*. Thus, the record supported the trial court's conclusion that the decedent was willfully negligent because he knew of and appreciated the risk presented by driving 17 hours without resting, but decided to undertake the risk anyway.

4. Madlock v. Square D Co., 269 Neb. 675, 695 N.W.2d 412 (2005)

SCHEDULED MEMBER V. WHOLE BODY INJURIES

LOSS OF EARNING POWER

The Supreme Court affirmed the review panel's determination that the trial court erred in awarding separate benefits for plaintiff's scheduled member injury to the foot in addition to the award for loss of earning power, because the impact of the member injury was already taken into consideration in determining plaintiff's loss of earning power.

Plaintiff was injured when a heavy box landed on her right foot. The parties disputed whether her subsequent low back problems claimed from an altered gait due to the foot injury were causally related to the accident. The trial court concluded that plaintiff met her burden of proof with regard to causation for the back injury, and that a fair and accurate assessment of plaintiff's loss of earning power could not be made without considering the member injury, as even the medical experts could not segregate the adverse effects of the scheduled injury upon the whole body injury. The trial court found that the foot impairment was significant enough to add to plaintiff's overall loss of earning capacity, but also resulted in impairment to the scheduled member. The review panel reversed the portion of the award providing separate benefits for the member injury, concluding that to allow it would result in double recovery.

Neb. Rev. Stat. §48-121 does not specify how compensation is to be established when a worker suffers both a scheduled member injury and a whole body injury as a result of a single accident. In *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003), the Court held that if a scheduled member injury adversely affects the worker such that a loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the court is permitted to do so. However, the Court found no authority regarding whether a worker may receive compensation for both a member injury and whole person injury when the member injury was considered in assessing the whole body injury and resulting loss of earning power. Therefore, the Court looked to other jurisdictions for guidance. In the instant case, the whole body injury could not be separated from the scheduled member injury and both injuries arose from the same accident. Thus, the trial court was required to consider the scheduled member injury in awarding benefits because the loss of earning capacity could not be fairly and accurately assessed without it. Under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for the loss of earning capacity. The review panel's reversal of the trial judge in that respect was therefore affirmed.

5. Soto v. State, 269 Neb. 337, 693 N.W.2d 491 (Feb. 18, 2005) and Supplemental Opinion, Soto v. State, 270 Neb. 40, 699 N.W.2d 819 (June 24, 2005)

WAITING-TIME PENALTY

STATUTORY CONSTRUCTION

SEPARATION OF POWERS

The Supreme Court reversed and remanded the review panel's reversal of a single-judge award which ordered waiting-time penalty and attorney fees for late payment of a portion of prior award.

The Court of Appeals previously affirmed plaintiff's award of \$71,666.64 and weekly compensation of \$409.00; the mandate was issued June 27, 2002. Defendant (the State of Nebraska) paid the plaintiff \$50,000 and withheld the remainder of the amount due, citing §48-1,102, which requires legislative approval of awards in excess of \$50,000. Defendant paid the additional weekly payment starting on June 18, 2002, through January 27, 2003. In November 2002, the plaintiff filed a petition for immediate payment of the remainder of the award, as well as waiting-time penalties and/or attorney fees.

The trial court found that a portion of the original award was late, and assessed a 50 percent waiting-time penalty on the late portion as well the delinquent weekly payments after January 27, 2003. The review panel reversed the award of penalties. The panel reasoned that the Legislature could not have intended to make the State liable for waiting-time penalties when legislative review would inevitably entail well in excess of 30 days. Plaintiff appealed, and the Supreme Court granted the plaintiff's motion to bypass the Court of Appeals on the issue of whether penalties for payments sent in excess of 30 days could be assessed against the State.

The Supreme Court noted that citizens may sue the State only to the extent that the State has waived its sovereign immunity. Statutes waiving immunity from suit are strictly construed. Section 48-199 provides, that "the state shall be liable [under the Workers' Compensation Act] in the same manner and to the same extent as a private individual under like circumstances." Section 48-1,102 provides that all workers' compensation awards in excess of \$50,000 against the State must be appropriated by legislative approval. Finally, §48-125 provides a penalty to the plaintiff if the employer fails to pay benefits due within 30 days of "the entry of a final order, award, or judgment of the compensation court." Plaintiff argued that because §48-199 includes no stated exception for waiting-time penalties, a penalty should be assessed on the unpaid portion of the award.

The Supreme Court first identified the conflict between §48-199 and §48-1,102. Section 48-1,102 requires legislative approval, which is a requirement not imposed on private employers. The Court concluded that the specific statutory language of §48-1,102 controls over the general language of §48-199. Plaintiff contended that such legislative review was unconstitutional as it violated the separation of powers doctrine. The Supreme Court disagreed, stating that it was reasonable to interpret §48-1,102 (as the State did) to mean that legislative review merely provides for an official examination to verify a lawful basis for appropriation of public moneys. Therefore, it did not violate the separation of powers doctrine. The Court went on to note that it was "unlikely that the Legislature intended . . . to subject the State to waiting-time penalties in cases where compliance within 30 calendar days was impossible." However, the Supreme Court also noted that it was not the intent of the Legislature to release the State from the timely payment obligations, citing the Act's beneficent purpose. Therefore, the State is liable for penalties on payments for the portion of workers' compensation awards over \$50,000 sent after 30 days. The State must request review and appropriation of such amount during the first

legislative session following the date the award became final, and must pay such amount within 30 calendar days after the Legislature's approval.

6. Sweeney v. Kerstens & Lee, Inc., 268 Neb. 752, 688 N.W.2d 350 (2004).

CAUSATION - PROXIMATE CAUSE

INDEPENDENT INTERVENING CAUSE

PSYCHOLOGICAL DISORDER

The Supreme Court reversed the Court of Appeals and agreed with the compensation court's finding that plaintiff's depression stemming from an unfavorable loss of earning report was not compensable.

The plaintiff sustained work-related neck and arm injuries resulting in a loss of earning capacity assessment of 55-60 percent. Following the loss of earning capacity report, plaintiff became severely depressed and attempted suicide. Plaintiff's psychiatrist diagnosed him with depression and gave an opinion that plaintiff was unable to work. Based on this opinion, a 100 percent loss of earning capacity was assessed. Defendant requested that plaintiff be examined by another psychiatrist, who opined that the depression was solely the result of the loss of earning capacity report and was not the result of his physical disability. The trial court found this opinion persuasive and held that the psychological disorder was not compensable, as it did not result from the accident but from the report. The review panel affirmed the decision of the trial court. The Court of Appeals reversed, finding that the psychiatric injury would not have occurred without the work-related injuries to the plaintiff's neck and arm, and therefore it was compensable as a natural consequence of his work related injury. *Sweeney v. Kerstens & Lee, Inc.*, 12 Neb. App. 314, 672 N.W.2d 257 (2003).

The Supreme Court began its analysis by deferring to the trial court's finding that the proximate cause of plaintiff's depression was not the initial injury itself, but rather the unfavorable loss of earning assessment. An employee is entitled to receive compensation for mental illness if it is the proximate result of a work-related injury and the employee is disabled because of the mental illness. *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991). However, in workers' compensation cases, a distinction must be observed between causation rules affecting the primary injury and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results." *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991). In the instant case, plaintiff's depression was entirely attributable to the loss of earning capacity report. The Supreme Court looked to case law in other states and held that a psychological injury resulting solely from litigation is not proximately caused by the underlying accident. Therefore, plaintiff's litigation stress in this case was an independent intervening cause that broke the causal connection. The Supreme Court concluded that while the Court of Appeals correctly held that plaintiff's depression would not have occurred without his work-related accident, the lower court erred in finding plaintiff's depression was a natural, as opposed to an extraordinary, result of the accident.

7. Swoboda v. Volkman Plumbing, 269 Neb. 20, 690 N.W.2d 166 (2004)

ACCIDENT

REPETITIVE TRAUMA - SUDDENLY AND VIOLENTLY

The Supreme Court affirmed the review panel's reversal and remand to the trial court, thereby determining that plaintiff's shoulder injuries were compensable.

In 2000, plaintiff injured his head and neck when he hit his head at work. On a fishing trip in 2001, plaintiff woke up with extreme pain and was unable to move his left arm. He treated with an orthopedic surgeon who diagnosed the plaintiff with a partial rotator cuff tear with tendonitis in his left shoulder. A second physician diagnosed plaintiff with a degenerative shoulder condition in both shoulders and a rotator cuff tear in his left shoulder. He attributed the rotator cuff tear to the incident during plaintiff's fishing trip, although the underlying problem was most likely caused by plaintiff's overhead work duties. Surgery on both shoulders revealed there was no tear in the left shoulder. The surgeon then diagnosed tendonitis in both shoulders, which he attributed to the overhead work plaintiff performed on the job.

The trial court found that the neck and head injuries were compensable, but that the shoulder injuries were not, and determined plaintiff experienced a 45 percent loss of earning capacity. The judge noted the conflict in the medical opinions and found that the plaintiff failed to prove his shoulder injuries occurred "suddenly and violently" since the only identifiable point in time for the injury was the fishing incident. Defendant was awarded credit for payments made for the shoulder injuries toward its liability for the head and neck injuries. The review panel found that the medical opinions were not in conflict, as the arthroscopy revealed no tear in the left shoulder, meaning that the portion of the medical opinion attributing a tear to the fishing trip was not valid. Because the second medical opinion attributed the "underlying shoulder problem" to the plaintiff's work activities, the opinions were not in conflict, and the trial court was clearly wrong in basing its dismissal on that conflict. Additionally, the review panel reversed the finding that the plaintiff failed to prove a compensable accident that occurred suddenly and violently. The panel also found that the trial judge lacked jurisdiction to award credit against a compensable claim for payments made on a non-compensable claim. Finally, the review panel affirmed the trial court's finding of loss of earning capacity.

The Supreme Court agreed with the review panel's finding that plaintiff's shoulder injuries occurred suddenly and violently. Defendant argued that there was never any work event requiring plaintiff to miss work; rather, he suffered the disabling left shoulder symptoms during a fishing trip. As for the right shoulder, defendant claimed there was never a point where plaintiff's injury prevented him from doing work activities. Reaffirming *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), which sets forth the test used to determine whether repetitive trauma injury is an accident within the statutory meaning, the Supreme Court clarified that there is nothing in *Dawes* requiring that the identifiable point in time occur while an employee is "on the clock". The Supreme Court also cited *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), in finding that the right shoulder injury was compensable. Even though plaintiff did not initially seek treatment specifically for the right shoulder, which was discovered to be injured during treatment for the left, he ultimately sought treatment for both shoulders.

Having determined that the plaintiff's bilateral shoulder injuries were compensable, the Supreme Court found that the question of whether the trial court had jurisdiction to award the defendant credit against the head and neck claim for payments made on the bilateral shoulder injury was moot.

8. Zoucha v. Touch of Class Lounge, 269 Neb. 89, 690 N.W.2d 610 (2005)

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

"GOING TO AND COMING FROM WORK" RULE

The Supreme Court ruled that the trial court erred in finding that the claimant's injuries did not arise out of and in the course of her employment. The cause was reversed and remanded.

The plaintiff was employed as a bartender and waitress. Her employer leased the building in a shopping plaza and the parking lot was provided for common use of all the businesses in the shopping plaza. The employer did not own or have control over the parking lot. Employees were not required, but could, park in the lot. The plaintiff left her employment after her shift and went to her car in the parking lot. The plaintiff was assaulted and sustained a skull fracture and other injuries.

The trial court, applying the "going to and from work" rule, dismissed the petition, finding that the assault did not take place on the employer's premises and therefore did not occur in the course of her employment. The order was affirmed by the review panel and the Nebraska Court of Appeals.

The "going to and from work" rule states that injuries sustained by an employee while going to and coming from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the cause of the injury. *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W. 2d 212 (2001). Although its current formulation of the going to and coming from work rule would allow an employee to recover for injuries sustained off the employer's premises, see *id.*, the Court in this case concluded that plaintiff was on the employer's premises, even though the employer did not own or maintain the lot. Relying on case law from other states, the Supreme Court found that a shopping plaza parking lot provided for the convenience of, and used by, employees of the businesses located there, is part of the premises of an employer located in the plaza. Having found that plaintiff was injured on the employer's premises, the Supreme Court went on to conclude that her injuries arose out of and in the course of her employment. "As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work . . . are compensable . . ." *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243, 247 (1986).

Court of Appeals Cases (Designated for Permanent Publication):

1. Arbtin v. Puritan Mfg. Co., 13 Neb. App. 540, 696 N.W.2d 905 (2005)

AVERAGE WEEKLY WAGE

The Court of Appeals reversed the trial court's calculation of average weekly wage.

Plaintiff claimed an average weekly wage of \$575.00 for the 26 weeks preceding his injuries. The trial court found that plaintiff's average weekly wage was \$497.60, rejecting plaintiff's argument that two weeks when there was a shortage of work should be excluded from the 26 week calculation. Plaintiff appealed to the review panel, which determined that plaintiff's average weekly wage was \$506.93 rather than \$497.60. The panel held that the two weeks when there was a work shortage should be excluded. Plaintiff appealed and defendants cross-appealed.

The Court of Appeals agreed with the review panel's determination that the rule of *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990), should extend to weeks which were abnormally low due to work shortages. In *Canas*, the Supreme Court construed §48-126 to require exclusion of abnormally low workweeks due to sickness and holidays. Defendants also argued that the holding in *Canas* should apply not only to abnormally low work weeks, but also to exclude abnormally high workweeks. The Court of Appeals disagreed, citing the beneficent purposes of the Act which require that it be liberally construed. In addition, the Legislature addressed the use of abnormally high workweeks under §48-126 which provides that the average weekly wage calculation should be made "exclusive of earnings from overtime." Therefore, excluding overtime is the appropriate method to deal with the possible imbalance that could arise from abnormally high workweeks.

2. Armstrong v. Watkins Concrete Block, 12 Neb.App. 729, 685 N.W.2d 495 (2004)

PLEADINGS AND PROOF

ACCIDENT

OCCUPATIONAL DISEASE

REPETITIVE TRAUMA

REASONED DECISIONS

The Court of Appeals reversed and remanded with direction to reconsider whether plaintiff had proved either a specific injury or cumulative trauma injury in conformity with Rule 11 requiring reasoned decisions.

Plaintiff was loading concrete blocks into a truck on May 11, 2001 when he felt a pull on the left low side of his back and alleged he sustained a herniation of a lumbar disk. Plaintiff sought treatment from a chiropractor stating he was injured on the job. Eleven months later, he awoke with severe back pain and was unable to get up, necessitating surgery to repair a herniated disk. Plaintiff filed a petition claiming May 11, 2001 as the date of the accident. On the day of trial, plaintiff moved to conform the pleadings to the proof, arguing that the trier of fact should determine whether plaintiff's condition requiring surgery resulted from either repetitive trauma or a single episode. It was clear that plaintiff was not seeking to actually file another amended petition or claim. The trial court denied the motion and dismissed plaintiff's petition for benefits, as there was no expert opinion that plaintiff suffered an injury in an accident on or about May 11, 2001. The review panel affirmed, and plaintiff appealed.

The Court of Appeals first considered the trial court's denial of plaintiff's motion to conform the pleadings to the proof. Neb. Rev. Stat. §25-852 (Reissue 1995), in effect at the time of the action but since repealed, allows a party, upon motion, to amend any pleading in a number of situations, including when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. The right to amend pleadings rests within the discretion of the trial court. *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980). The case law did not support the notion that the fact finder, upon a motion to "conform the pleadings to the proof," picks and chooses a rationale for an award of benefits from among those that have some plausible support in the record, rather than the plaintiff's amending his or her petition to advance another rationale for recovery. Section 25-852 was amended in 1993 to clarify that a court may permit a party to amend any pleading, process, or proceeding at any time in the furtherance of justice, but that a court may not make such an amendment on its own initiative. In the instant case, plaintiff's counsel, the moving party, did not present the trial court with a specific amendment to the pleadings. Therefore, there was no abuse of discretion by the trial court in denying plaintiff's motion to "conform to the proof."

The Court of Appeals next considered the compensability of plaintiff's injury. The Court reviewed plaintiff's work history of heavy lifting with defendant over six years and the medical evidence from a physician opining that the cause of plaintiff's herniated disc was repetitive lifting activities from his work with defendant. Based on that evidence, the Appeal Court determined there was evidence adduced at trial that plaintiff's injury was the result of repetitive trauma. If an employee stops work and seeks medical treatment as plaintiff did in this case, then the employee has established the identifiable point in time when the injury occurred, which is sufficient to establish the component of the "suddenly and violently" test required to prove an accident. See *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001). Thus, the

Supreme Court established the core principle that whether a cumulative trauma injury has been proved is to be tested under the definition of "accident." In the instant case, the trial court erred in viewing a specific injury case as completely different from a cumulative trauma case, and in ruling that pleading of a specific injury date precludes consideration of whether a cumulative trauma injury had been proved. If the trial court had considered plaintiff's claim under a repetitive trauma theory, defendant's defense of the claim would not have substantially changed, as the Court in *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987) determined that no election between cumulative trauma and specific injury is required.

Because the trial court failed to provide a reasoned decision as to whether plaintiff proved either a specific injury or a cumulative trauma injury, the cause was remanded for reconsideration in conformity with Rule 11 of the Workers' Compensation Court Rules of Procedure.

3. Baucom v. Driver Management, Inc., 12 Neb. App. 790, 686 N.W.2d 98 (2004)

EVIDENCE - MEDICAL REPORTS

The Court of Appeals upheld the admissibility of certain medical reports on different grounds, but affirmed the compensation court's award of benefits related to plaintiff's total knee replacement.

Plaintiff was injured in a work-related accident which ultimately required a total knee replacement. The trial court awarded plaintiff benefits. Defendant appealed, alleging the trial court erred in finding causation and awarding benefits, since the court relied on improperly admitted medical reports (exhibits 3 through 9). Defendant alleged that the medical reports did not comply with Rule 10 of Workers' Compensation Court Rules of Procedure because they lacked the history, diagnosis and findings of the physician.

The review panel affirmed the trial court's award for two reasons. First, defendant failed to preserve on appeal its objection that exhibits 3 through 9 did not comply with Rule 10. The panel explained that a medical report which does not comply with Rule 10 is inadmissible as hearsay, but defendant did not object on the basis of hearsay. Second, the review panel based its affirmance on the finding that it was not error for the trial court to admit exhibits 3 through 9, as these report did not violate Rule 10 when all were read in conjunction with each other.

The Court of Appeals first determined that defendant's objection on appeal could have been implied to be that the medical reports in question did not comply with Rule 10; nonetheless, defendant's objections were without merit. The Court found that both defendant and the review panel were misconstruing Rule 10. The only reports that must set forth the history, diagnosis, findings, and conclusions of the physician are signed narrative reports. According to the Appeal Court, "Rule 10 merely states that when a report is a narration setting forth the history, diagnosis, findings, and conclusions of a physician and when the report is relevant to the case, the report must be considered evidence on which a reasonably prudent person is accustomed to rely in the conduct of serious affairs . . . Clearly the words 'narrative,' 'history,' 'diagnosis,' 'findings,' and 'conclusions of the physician' are not elements that every report must have in order to be admissible under [R]ule 10."

The Court of Appeals went on to find that exhibits 3 through 9, with the exception of exhibit 6, contained a physician's signature and were in compliance with Rule 10. Exhibit 6 did not contain a physician's signature and should not have been admitted into evidence. However, since the trial court did not expressly rely on exhibit 6 and it contained no information regarding causation or other substantive details, its admission was harmless error. Therefore, the review panel reached the right result, albeit for the wrong reason, and the panel's affirmance of the trial court's award was upheld.

4. Kam v. IBP, 269 Neb. 622, 694 N.W.2d 658 (2005)

TEMPORARY PARTIAL DISABILITY

The Court of Appeals reversed the trial court's decision that the employee suffered 100 percent loss of earning power during the periods of temporary partial disability.

The employee injured her right shoulder while employed by defendant. As a result of her injury and subsequent treatment, the employee was unable to work at times, and there were other periods where she was only able to work in light or restricted duty positions.

The trial court awarded temporary and permanent disability benefits. Because of her restrictions, the trial court found that the employee had 100 percent loss of earning power during the periods of temporary partial disability. The review panel affirmed, finding that a non-English speaking employee, with few skills, and with physical restrictions, may be a temporary odd-lot employee as defined by the court's jurisprudence. The review panel explained that if an employee with permanent restrictions, working part-time, may be an odd-lot employee entitled to permanent total disability, there is no reason why the same standards may not be applied to an employee with temporary disability.

The Court of Appeals disagreed and found as a matter of law that when dealing with temporary partial disability, an employee cannot earn wages at a similar job with the same employer and at the same time have 100 percent loss of earning power. The Court was unable to find any cases applying the odd-lot doctrine to temporary disability. In addition, the Court noted that if an employee receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity. *Heiliger v. Walters and Heiliger Electric*, 236 Neb. 459, 461 N.W. 2d 565 (1990). Finally, the Court looked at the definition of partial disability, which is defined as, "a worker's inability to perform all the duties that he or she could do before an accident, even though the worker can still engage in some gainful activity on the job." *Black's Law Dictionary* 474 (7th ed. 1999). The Court stated that one cannot reconcile a 100 percent loss of earning capacity with an ability to "engage in some gainful activity on the job," which ability the plaintiff had, since she continued to work at the same wage.

In spite of the general principle that earning power is not synonymous with wages, but also includes eligibility to procure employment, ability to hold a job obtained, and capacity to perform the tasks of the work, the cause was remanded to correct the award of temporary partial disability, which the Court of Appeals described as, " . . . essentially a mathematical calculation of wages, earned by Kam while she was temporarily partially disabled, as a percentage of her preinjury earnings."

5. Ladd v. Complete Concrete, Inc and Federated Mutual Ins. Co., 13 Neb. App. 200, 690 N.W.2d 416 (2004)

HEARING LOSS

LOSS OF EARNING CAPACITY - MULTIPLE EVALUATIONS

The Court of Appeals affirmed the compensation court's determination that plaintiff was permanently and totally disabled.

Plaintiff suffered numerous injuries to his head and body as a whole while working for defendant, including loss of hearing and cognitive deficits. A court-appointed vocational rehabilitation counselor prepared a loss of earning capacity analysis in April 2003 ("April LOE"). The April LOE concluded that plaintiff's loss of earning capacity was 60 percent. At plaintiff's request, a second vocational rehabilitation counselor prepared a rebuttal report ("Rebuttal LOE") which concluded that plaintiff's loss of earning capacity was 80 percent. In May 2003, the court-appointed counselor prepared a supplemental analysis to address new medical information ("May LOE"). The May LOE stated that plaintiff's loss of earning capacity was 100 percent.

In June of 2003, one of plaintiff's physicians wrote a letter ("June Letter") responding to questions posed by defendant. The physician stated that plaintiff could possibly perform a job where there was little need for communication if he had the benefit of a hearing aid. Defendants then requested that the court-appointed counselor respond to the doctor's letter. She responded by letter in July 2004 ("July LOE") that plaintiff's loss of earning capacity was 70 percent.

The trial court entered an award based on the May LOE, finding that plaintiff was permanently and totally disabled. The trial court found that it was improper for the court-appointed counselor to reach the conclusion in the July LOE based on plaintiff's use of a hearing aid. The court noted that the impact of hearing loss on an employee's earning power should be measured by his uncorrected loss of hearing without consideration of any restoration that may be afforded by hearing aids. Additionally, the doctor's opinion in the June letter that plaintiff could possibly work with a hearing aid was not expressed with a reasonable degree of medical probability. The review panel affirmed the award, and defendant appealed alleging it was error to affirm the finding that plaintiff's loss of earning capacity was 100 percent. Defendants also alleged it was error to affirm the finding that the June letter did not form a basis for the court-appointed counselor to revise her analysis.

The Court of Appeals looked at two cases involving multiple loss of earning reports by the same court-appointed counselor and found the case at bar to be more analogous to *Noordam v. Vickers, Inc.*, 11 Neb. App. 739, 659 N.W.2d 856 (2003), rather than *Variano v. Dial Corp.*, 256 Neb. App. 318, 589 N.W.2d 845 (1999). In *Noordam*, the Court held that when a vocational rehabilitation counselor submits multiple reports which were written not because plaintiff's recovery was incomplete at the time of a prior report, but rather because of different factual scenarios, it is up to the trial court to make factual findings to determine which report is entitled to the rebuttable presumption of correctness. In this case, the July LOE was simply a different scenario than the May LOE, and the trial court's implicit finding that the rebuttable presumption of correctness should be applied to the May LOE was not clearly erroneous. The trial court's findings regarding the June 2003 letter (i.e. that it did not form a basis to revise plaintiff's loss of earning capacity) were also correct. The Court cited *Kalhorn v. City of Bellevue*, 227 Neb. 880, 420 N.W.2d 713 (1988) which held that disability benefits are awarded based upon the uncorrected or unaided impairment. Finally, the finding of permanent total disability by the trial court was supported by the record and not clearly wrong.

6. Lucas v. Anderson Ford, 12 Neb.App. 951, 687 N.W.2d 430 (2004)

OPINION WITHDRAWN BY THE COURT. SUBSTITUTED OPINION AT 13 Neb.App 133, 689 N.W.2d 354 (2004).

7. Lucas v. Anderson Ford, 13 Neb.App. 133, 689 N.W.2d 354 (2004)

ARISING OUT OF EMPLOYMENT

IDIOPATHIC FALL

WORKERS' COMPENSATION TRUST FUND

The Court of Appeals affirmed the finding of the review panel that the trial court was clearly wrong in finding the plaintiff suffered an accident arising out of his employment. The Court also determined that the presiding judge as conservator-trustee of the Workers' Compensation Trust Fund was not a proper party to the action.

Plaintiff was involved in a non-work related motorcycle accident in the 1970s resulting in the amputation of his left leg below the knee. Plaintiff claimed a work-related injury in 1996 and filed a petition for benefits. Defendant filed a third-party petition against the Workers' Compensation Trust Fund, asserting it was liable because defendant was aware that plaintiff was an amputee at the time of hire. Defendant was directed in an order by the trial judge to add Judge High, the presiding judge of the compensation court and the person statutorily charged with conservation of the assets of the Trust Fund, as a third-party defendant in an amended petition. Judge High filed an answer stating he was not a proper party to the lawsuit.

A coworker testified that on the alleged date of injury, plaintiff stood up from a desk, his eyes rolled back into his head and he fell flat on the floor. He was taken to the emergency room and tests revealed he had sustained a hip fracture. Plaintiff's primary physician stated that plaintiff either fractured his hip as a result of his fall to the ground after fainting, or he fractured his hip upon standing and the pain caused him to faint and fall. The emergency room physician opined that plaintiff fainted due to hypoglycemia aggravated by plaintiff's alcohol usage the previous evening. The trial judge entered an award for plaintiff, finding that although plaintiff fainted due to the personal cause of hypoglycemia, the placement of the desk and chair in the workspace increased his risk of injury. The review panel reversed the trial court's award, holding that there was insufficient evidence to remove the employee's fall from the general rule that harm that can be attributed to personal or idiopathic causes is universally non compensable. See *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). The review panel also found that Judge High was not a proper party to the action, but the issue was moot, as plaintiff was not entitled to benefits.

The Court of Appeals affirmed the review panel, noting that nonstrenuous walking, while bearing one's own body weight is the epitome of a nonemployment risk. *Carter v. Becton-Dickinson*, 8 Neb.App. 900, 603 N.W.2d 469 (1999). Standing up from a seated position certainly does not constitute any greater risk. In regard to Judge High's cross-appeal, the Court found that the issue of whether the presiding judge was the proper party was moot. Nonetheless, the Court decided to address it citing the public interest exception to the mootness doctrine which requires consideration of a public question. When claims are made against the Trust Fund, the proper procedure is set forth in §48-162.02(8), which provides that the State of Nebraska is impleaded as a party or may bring an action under Neb. Rev. Stat. §§48-128 and 48-162.02. Therefore, the presiding judge is not a proper party in cases involving claims against the Trust Fund.

8. Milliken v. Premier Industries, Inc., 13 Neb.App. 330, 691 N.W.2d 855 (2005)

REASONABLE CONTROVERSY

ATTORNEY FEES

WAITING-TIME PENALTY

The Court of Appeals reversed the compensation court's denial of a waiting-time penalty and associated attorney fees, finding that no reasonable controversy existed. The cause was remanded with direction.

The trial court entered an award for benefits to plaintiff for his shoulder problems, pursuant to the stipulations of the parties. The primary issue at trial was plaintiff's entitlement to waiting-time penalties and attorney fees. The trial court found that a reasonable controversy existed regarding the occurrence of an accident because plaintiff did not seek treatment until a year after the onset of pain, by which time he had left his employment with defendant and had another job. Therefore, no penalties or fees were due. The review panel affirmed the findings of the trial court.

Section 48-125 authorizes a 50 percent penalty payment for waiting time where the employer fails to pay compensation after 30 days' notice of the disability and where no reasonable controversy exists regarding the employee's claim for benefits. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003); *Hale v. Vickers, Inc.*, 10 Neb.App. 627, 635 N.W.2d 458 (2001). Whether a reasonable controversy exists is a question of fact. *Hale v. Vickers, Inc.*, *supra*. The record in the instant case showed that defendant had notice of the injury when it received a letter from plaintiff's physician, but sought no independent medical opinion until approximately seven months later. In support of denying benefits, the defendant cited plaintiff's continuation of work following the injury, his failure to mention any injury upon quitting his job with defendant, and his failure to seek medical care for a full year after the injury. The Court distinguished the facts in this case from *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). In that case, a reasonable controversy existed until a physician's deposition finding that the injury was work related and the employer began making disability payments within thirty days after the deposition. In contrast, defendant in the instant case failed to pay any benefits until the eve of trial, even after finally obtaining an expert opinion that failed to contradict plaintiff's physician's causation opinion. The Appeals Court found that defendant had no actual basis for refusing to pay workers' compensation benefits once it was put on notice of plaintiff's injury. Therefore the Appeals Court reversed the judgment of the compensation court and remanded to the trial court for a determination of penalties and fees.

9. Morin v. Industrial Manpower, 13 Neb.App. 1, 687 N.W.2d 704 (2004)

JURISDICTION

FINAL ORDER

LOANED-SERVANT DOCTRINE

The Court of Appeals affirmed the compensation court's finding that it had jurisdiction over the claim filed by the employee against the staffing company.

There were three partners of the staffing company in this case, two of whom lived in Nebraska. The staffing company had its bank account in Nebraska. The staffing company obtained specialized workers for other companies around the country in need of industrial construction workers. The staffing company employed three labor brokers, two of whom lived in Nebraska. The labor brokers received calls from prospective workers and matched them up with construction companies. The staffing company paid the premiums for the workers' compensation insurance, provided paychecks to workers and withheld taxes from the paychecks. The plaintiff was sent to work at a welding company in Massachusetts where he injured his ankle. Plaintiff filed a petition naming the staffing company and its workers' compensation carrier as defendants but not the welding company. Defendants argued plaintiff was performing work in Massachusetts and never performed work in the state of Nebraska. At a hearing for the limited purpose of determining the proper jurisdiction for the lawsuit, the trial court found that the petition was properly filed in the State of Nebraska and that the court had jurisdiction to hear the claim. The review panel affirmed.

The Court of Appeals first noted that a workers' compensation case is a special proceeding for appellate purposes and that an order affecting a substantial right made during a special proceeding is a final order that may be reviewed on appeal. *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002). In the case at bar, the trial court proceeding was bifurcated for an initial determination of the jurisdictional issue only. Because the jurisdictional issue affected a substantial right of the defendant, the resulting order was a final, appealable order. Therefore, the Court of Appeals determined that it had appellate jurisdiction over the claim.

The Court of Appeals next looked to the issue of whether the staffing company in the instant case was an employer. As stated in *Daniels v. Pamida, Inc.*, 251 Neb. 921, 561 N.W.2d 568 (1997), the loaned-servant doctrine provides that if an employer loans an employee to another for the performance of some special service, then that employee, with respect to the special service, may become the employee of the party to whom his services have been loaned. This principle applies to workers' compensation cases and allows an employee to be simultaneously in the general employment of one employer and in the special employment of another, and for the employee to seek compensation from one or the other or both employers. The Court upheld the compensation court's decision that plaintiff was the employee of both the staffing company and the welding company. Applying the three-part test set forth in *Daniels*, the Court found there was no dispute that plaintiff had at least an implied contract with the welding company, that the work done by plaintiff was the welding company's work, and that the welding company controlled the details of plaintiff's work. Meanwhile, the staffing company provided payroll services to the employees. Therefore, the Court concluded that the staffing company was the general employer and plaintiff was able to receive workers' compensation benefits from it.

10. Spaulding v. Alliant Foodservice, 13 Neb. App. 99, 689 N.W.2d 593 (2004)

WILLFUL NEGLIGENCE

ATTORNEY FEES

The Court of Appeals affirmed the compensation court's finding that the plaintiff was not willfully negligent, but found the review panel erred in failing to award attorney fees pursuant to §48-125(1).

Plaintiff fell while retrieving an order from racks where product was stored. To access the racks, plaintiff used a high-rise machine. The employer's safety rules required the use of a safety harness while using the high-rise machine. A supervisor testified that plaintiff had been warned for failing to use his harness on a previous occasion, but also indicated plaintiff was a good worker who would not intentionally disregard safety procedures. Although the safety harness was not attached at the time of his fall, plaintiff testified at trial that he believed it was correctly connected.

The trial court found that the plaintiff was not willfully negligent and at most, "demonstrated momentary inadvertence and ordinary negligence." The trial court awarded benefits, but denied plaintiff's request for waiting time penalties and attorney fees because the case presented questions of law that were not previously decided. The review panel affirmed in all respects.

The Court of Appeals first noted that the Nebraska Supreme Court has reviewed the term "willfully negligent" as used in §48-101 and §48-151(7) in the context of an employee's violation of a safety rule: "In order to avoid liability on the basis that the employee was willfully negligent, an employer must prove a deliberate act knowingly done or at least such conduct as evidences a reckless indifference to the employee's own safety. . . . Mere negligence is not sufficient." *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W. 2d 470 (2000). An employee's intentional defiance of a safety rule will disqualify him from receiving benefits if 1) the employer has a reasonable rule designed to protect the health and safety of the employee, 2) the employee has actual notice of the rule, 3) the employee has an understanding of the danger involved in the violation of the rule, 4) the rule is kept alive by bona fide enforcement by the employer, and 5) the employee does not have a bona fide excuse for the rule violation. *Id.* Defendant argued that these factors are determinative in all cases involving the violation of a safety rule, regardless if the violation was intentional. Under this standard, defendant claimed that the plaintiff was not entitled to benefits.

The Court of Appeals disagreed, stating that these five factors are inapplicable when an employee has accidentally violated a safety rule. *Guico*, *supra* and *Larson's Workers' Compensation Law*, §34.02 (2000). The Court upheld the compensation court's finding that the plaintiff did not intentionally fail to connect his safety harness; therefore he was not willfully negligent. Although the plaintiff was not entitled to an attorney fee under the "reasonable controversy" provision of §48-125, he was entitled to fees because defendant appealed and failed to obtain a reduction in the award. The cause was remanded accordingly.

11. Williamson v. Werner Enterprises, 12 Neb. App. 642, 682 N.W.2d 723 (2004)

NOTICE OF INJURY

The trial court determined that plaintiff failed to give the required notice of injury "as soon as practicable" after the occurrence and dismissed the petition. The review panel and Court of Appeals affirmed.

The plaintiff was a truck driver. While driving on December 23, 2000, plaintiff braked hard, causing the load to shift forward and slam against the front of the attached trailer. Plaintiff claimed that by the time he delivered the load, he was experiencing back pain.

The trial court found that the back injury was causally linked to the accident, but dismissed the petition because the plaintiff failed to give notice of his injury as soon as practicable as required by §48-133. In his deposition, plaintiff stated that he reported the injury to his employer in May 2001. At trial, he testified that he did not tell his employer prior to May 2001; however, he also testified that he had told the safety supervisor that he was in pain. The plaintiff had a chiropractic appointment three days after the accident and next saw a medical provider in May 2001. He did not submit the bill to defendant for payment, nor did he submit it under his own workers' compensation coverage. The trial court noted that while the plaintiff reported the load-shifting event, he did not report an injury. Section 48-133 requires notice of injury, not just notice of the accident.

The Court of Appeals stated that the question of whether notice was given as soon as practicable is a question of law upon which it must make a finding independent of that of the trial court. The purposes of the notice requirement are to enable the employer to provide immediate medical treatment and to facilitate the earliest possible investigation of the facts. 7 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, §126.01 (2003). In this case, plaintiff experienced an event at work and perceived pain connected to the event. Within days, he sought chiropractic care, where he attributed the pain to the event. The Court of Appeals concluded that the period from December to May exceeded the limits of reasonable delay. While the Workers' Compensation Act does not define practicable, it is described as meaning "possible, feasible, or able to be done." Webster's Encyclopedic Unabridged Dictionary of the English Language, 1127 (1989). The Court of Appeals opined that it was practicable to report the injury within a reasonable time after plaintiff sought chiropractic care for the pain he related to the load-shifting incident, and failed to do so. Therefore, the findings of the trial court and review panel were affirmed.

One judge dissented, opining that plaintiff was unaware of the true character or seriousness of his injuries until May or June of 2001. Therefore, that judge concluded plaintiff did give notice as soon as practicable after the accident.